CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Application(s) Involved:

C/Stay/20029/2018 in C/20001/2018-DB

Appeal(s) Involved:

C/20001/2018-DB

[Arising out of No. COC-CUSTMS-000-COM-22/17-18 dated 28/11/2017 passed by Commissioner of CUSTOMS , COCHIN]

Elton And Sons
Xxvi/1811 Subramanian Road Willingdon Island
COCHIN
KERALA
682003

Appellant(s)

Versus

C.C-Cochin-cus
CUSTOM HOUSE
COCHIN
KERALA
682009

Respondent(s)

Appearance:

Shri M BALAGOPAL ADVOCATE
#A5, HIG AVENUE, GANDHI
NAGAR ROAD, KADAVANTHARA COCHIN
COCHIN
KERALA
682020

For the Appellant

Shri Chandramohan, Commissioner(AR)

For the Respondent

Date of Hearing: 19/04/2018
Date of Decision:___________

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON’BLE SHRI DEVENDER SINGH, TECHNICAL MEMBER

Final Order No. ______________

Per : S.S GARG

The present appeal is directed against the impugned order dt. 28/11/2017 passed by the Commissioner of Customs, Cochin whereby the

Commissioner has revoked the licence issued to the appellant under Regulation 18 read with Regulation 20(7) of Customs Broker Licensing Regulations, 2013 (CBLR, for short) and also ordered for forfeiture of security deposit. Along with the appeal, appellant has also filed a stay petition for stay of the operation of the impugned order as per Rule 41 read with Rule 28C of the CESTAT(Procedure) Rules, 1982. Earlier the appellant also approached Hon'ble High Court of Kerala and the Hon'ble High Court vide judgment dt. 14/12/2017 in WP(C) No.33006 of 2017(A) directed the Tribunal to dispose of the stay petition within four weeks from the date of filing of the appeal. With the consent of both the parties, we proceed to decide the appeal itself.

2. Briefly the facts of the present case are that the appellant (Customs Broker – CB)has been holding Customs Broker's (CB) license issued by the Commissioner of Customs, Cochin under Regulation 7 of CBLR 2013 having validity up to 11/05/2024. The CB has also submitted an application for working under Form "C" at Tuticorin Commissionerate. Certain proceedings were initiated against the appellant on the basis of complaint received from the Commissioner of Customs, Tuticorin alleging that the appellant has attempted to smuggle Red Sanders by filing Shipping Bills by misusing IE Code and AD Code of M/s. Scott Garments, Bangalore. It is alleged that the appellant had undertaken the Customs related work for export of readymade garments through the freight forwarders M/s. Total Transport Systems Pvt. Ltd. using the IE code and

AD code of M/s. Scott Garments, Bangalore. Shri J.J. Ebanesar, one of the employee of the appellant, had filed the shipping bill and presented the cargo for examination and cleared the cargo. A show-cause notice was issued to the appellant for the alleged offence that they did not exercise due diligence in checking the authenticity of the documents submitted by their employee. The notice also stated that the appellant had failed in their responsibility by not ensuring proper conduct of their employee as required under the provisions of CBLR 2013. The appellant filed reply to the show-cause notice and raised the objection that the show-cause notice is hit by time limitation by relying upon the Regulation 20(1) of the CBLR. They also submitted that they cannot be held liable for not verifying the antecedents of the client, place of work of the exporter and that they had done KYC check and submitted documents as evidence and further that their employee Shri J.J. Ebanesar had acted beyond scope of his employment for which the appellant is not responsible. After considering the submissions of the appellant, the Commissioner upheld the allegation in the show-cause notice vide the impugned order and ordered for revocation of CB licence and forfeiture of security deposit under CBLR 2013. Aggrieved by the said order, the appellant has filed the present appeal.

3. Heard both sides and perused records.

4.1. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the impugned order is contrary to the binding judicial precedent on the same issue. He further submitted that the revocation of the licence and forfeiture of security deposit under CBLR 2013 is liable to be set aside as the same is hopelessly time bared, illegal and devoid of merits. He further submitted that the impugned order is based only on the belief that the appellant had failed to verify the antecedents of their client and had not physically verified the correctness of the KYC documents by directly contacting the exporter. He further submitted that the show-cause notice is hopelessly barred by limitation as per Regulation 20(1) of the CBLR 2013, which reads as follows:-

> ***20. Procedure for revoking licence or imposing penalty****. —*
> *(1) The Commissioner of Customs shall issue a notice in writing to the Customs Broker within a period of ninety days from the date of receipt of an offence report, stating the grounds on which it is proposed to revoke the licence or impose penalty requiring the said Customs Broker to submit within thirty days to the Deputy Commissioner of Customs or Assistant Commissioner of Customs nominated by him, a written statement of defense and also to specify in the said statement whether the Customs Broker desires to be heard in person by the said Deputy Commissioner of Customs or Assistant Commissioner of Customs.*

4.2. He further submitted that as per Regulation cited supra, the Commissioner of Customs shall issue notice in writing to the CB within 90 days from the date of receipt of an offence report. He further submitted that there is no provision in the Act and Regulation to extend the period of

90 days further for issuance of the show-cause notice. He also submitted that the show-cause notice has to be issued within 90 days from the date of receipt of an offence report and there is no definition of the term ‘offence report’ either in the Act or in the Rules or Regulation made thereunder. Further there is no form or procedure prescribed in the Act or the Regulation for the preparation or communication of the offence report. It is his submission that the offence report is that report or communication by which the commission or the detection of an offence is communicated to the mother Commissionerate by the agency / Commissionerate who have detected the offence. He further submitted that the date of knowledge gained by the Commissioner by means of any communication, be it show-cause notice or Order-in-Original or a letter narrating the offence committed, has to be construed as an offence report and its date of receipt by the Commissionerate concerned has to be taken as the date of receipt of the offence report. He further submitted that vide letter dt. 26/10/2016, the Turicorin Commissionerate had intimated the Commissioner of Customs, Cochin; the details of the alleged offence committed by the CB and had also forwarded a copy of Order-in-Original No.91/2016 dt. 30/09/2016 passed by the Additional Commissioner of Customs, Tuticorin and the receipt of the said letter was acknowledged by the Cochin Commissionerate on 03/11/2016. It is his further submission that in the present case, the date of receipt of the offence report shall be 03/11/2016 when the Commissioner of Customs, Cochin received the letter on 26/10/2016 along with Order-in-Original. He also submitted that the

Commissioner has failed to notice that the letter dt. 26/10/2016 clearly mentioned the alleged violation by the Customs Broker and the order passed by the Additional Commissioner, Tuticorin containing the alleged violation by the Customs Broker and the same was annexed with the letter dt. 26/10/2016. He further submitted that after receipt of this letter and the Order-in-Original, show-cause notice was issued on 01/06/2017 which is beyond the statutory period of 90 days as prescribed in the CBLR 2013. He further submitted that it is a well settled proposition of law that breach of time limit prescribed under Regulation 20 is fatal to the proceedings under CBLR. He further submitted that the enquiry report submitted by the Deputy Commissioner of Customs is having no date and cause titled appended to it. According to the learned counsel that there is time limit of 90 days prescribed for submission of enquiry report by the Enquiry Officer from the date of issuance of the show-cause notice. Further in the letter dt. 15/09/2017, nothing is recorded to prove that the said inquiry report was prepared and submitted on or before 30/08/2017. The learned counsel also submitted that the impugned order is also devoid of merits because the only allegation against the appellant is that he was careless in handling the clients and has not done mandatory verification / checks whereas the appellant has collected the KYC documents of the exporter though the appellant has not physically verified the details of the export by directly contacting the exporter. It is his further submission that for the misconduct of the employee, the appellant should not be held responsible as the said misconduct was outside the scope of his employment and the CB cannot be held liable for such illicit act of the employee. In support of his submissions, the learned counsel relied upon the following decisions:-

i. AM Ahamed & Co. Vs. CC(Imports), Chennai [2014(309) ELT 433 (Mad.)]
ii. Sowparnika Shipping Services Vs. CC, Chennai-VIII [2017(352) ELT 286 (Mad.)]
iii. Ambika Enterprises Vs. CC(Import & General), New Delhi [2016(343) ELT 1022 (Tri. Del.)]
iv. Masterstroke Freight Forwarders P. Ltd. Vs. CC(I), Chennai [2016(332) ELT 300 (Mad.)]
v. Sanjeev Kumar Vs. CC(General), New Delhi [2016((344) ELT 988 (Tri. Del.)]
vi. Lohia Travels & Cargo Vs. CC(General), New Delhi [2016(331) ELT 614 (Tri. Del.)]
vii. Judgment dt. 13/10/2017 of Hon’ble High Court of Madras in CMA No.730 of 2016.
viii. Final Order No.40595/2017 dt. 04/01/2017 of CESTAT, Chennai.
ix. APS Freight & Travels Pvt. Ltd. Vs. CC(General), New Delhi [2016(344) ELT 602]
x. K.S. Sawant & Co. Vs. CC(General), Mumbai [2012(284) ELT 363]
xi. CC Vs. HIM Logistics Pvt. Ltd. [2017(348) ELT 625]
xii. CC Vs. Yogesh Kumar [2017(349) ELT 12]
xiii. LMS Transport Co. Vs. CC(General), Mumbai [2014(299) ELT 368]

5. On the other hand, the learned AR defended the impugned order and submitted that the show-cause notice was issued within 90 days from the date of receipt of offence report dt. 28/02/2017 and the same was received on 06/03/2017 and thereafter show-cause notice was issued on 01/06/2017 which is within a period of 90 days. He further submitted that the Commissioner has given detailed reasons for considering each and every submission made by the appellant. He further submitted that as per the various decisions of the Hon’ble Supreme Court, the Tribunal has to interpret the words written in the statute which is clear and there is no

ambiguity in it. He further submitted that the communication by the Tuticorin Commissionerate along with the Order-in-Original which was received by the Cochin Commissionerate on 03/11/2016 cannot be termed as offence report. He further submitted that on merit also, the appellant has misconducted in performing his duties as Customer Broker as he has not properly verified the documents and the exporter physically.

6.1. After considering the submissions of both parties and perusal of the material on record and the various decisions relied upon by the appellant, we find that the time schedule prescribed under the Regulations during the relevant period are as under:-

CHALR, 2004	**CBLR, 2013**	**Purpose**	**Specified Time Period**
22(1)	20(1)	Issuance of show cause notice to the CHA/CB by the Commissioner.	**Within 90 Days** from the date of receipt of an offence report.
22(5)	20(5)	Preparation of Report of Inquiry by the Deputy/ Assistant Commissioner.	**Within 90 Days** from the date of issuance of the show cause notice.
22(7)	20(7)	Passing of order by the Commissioner.	**Within 90 Days** from the date of submission of the Inquiry Report.
TOTAL DURATION			**270 DAYS OR 9 MONTHS**

Further, we find that what constituted 'offence report' has not been spelt out in the Regulation. The same will have to be inferred from the circumstances of the case. From the records, we find that by letter dt. 26/10/2016, the Tuticorin Customs Commissionerate intimated the Cochin Customs Commissionerate and the Order-in-Original was also sent to the Cochin Customs Commissionerate along with this letter and it was requested by Tuticorin Customs to the Cochin Customs to take action under CBLR 2013 against the appellant. This Order-in-Original and the letter dt. 26/10/2016 can be considered as 'offence report' because the Order-in-Original is very clear regarding the alleged offence committed by the appellant. Therefore the date of knowledge gained by the Commissioner by himself of any communication be it a show-cause notice or the Order-in-Original or a letter narrating the offence committed has to be construed as an offence report and the date of receipt by the Cochin Commissionerate has to be taken as the date of offence report. Further we find that the show-cause notice proposing to revoke the licence was issued on 01/06/2017 which is beyond the period of 90 days time limit prescribed by the CBLR. Further we find that in the case of Ambika Enterprises, the Division Bench of this Tribunal considered an identical issue and held that show-cause notice issued beyond 90 days is not sustainable in law being violative of the Regulations. The Division Bench of the Tribunal has relied upon the decision of the Madras High Court where this Regulation was specifically considered and in para 9 & 10, the Tribunal has observed as under:-

> ***9.*** *The Hon'ble High Court of Madras in A.M. Ahamed & Co. v. Commissioner of Customs (Imports), Chennai - 2014*

(309) E.L.T. 433 (Mad.) has held as under :

"20. The time limit prescribed in Regulation 22(1) has to be understood in the context of the strict time schedule prescribed in various portions of the Regulations. Regulation 20(2), for instance, entitles the Commissioner, to suspend the licence of an agent, in appropriate cases where immediate action is necessary. Regulation 22(3) prescribes a time limit of 15 days. Regulation 22(1) prescribes a time limit within which action is to be initiated. It also prescribes the time limit under Regulation 22(5). Therefore, considering the fact that the whole proceedings are to be commenced within a time limit and also concluded within a time frame, I am of the view that the show cause notice issued to the petitioner on 8-5-2010 with a copy marked to the first respondent should be taken as the date of receipt of the offence report. Consequently, the period of 90 days should commence only from that date. If so calculated, the impugned proceedings have obviously been initiated beyond the period of 90 days."

Hon'ble Madras High Court has further emphasized the observance of time limits strictly under CHALR, 2004/CBLR, 2013 in Saro International Freight Systems v. Commissioner of Customs, Chennai reported in 2015-TIOL-2916-HC-MAD-CUS = 2016 (334) E.L.T. 289 (Mad.). The Hon'ble High Court in Para 28 of the above judgment has held :

"28. ...... It is pertinent to mention here that the CBLR, 2013 have replaced the CHA Regulations. The CHA regulations did not have any time limit to complete the proceedings. Therefore, by a Circular 09/2010, dated 8-4-2010, the necessity to include a time limit for initiating action was addressed by the Board after field inspection and by a notification dated 8-4-2010, amendments prescribing time period for initiating action and completing proceedings was made. The same was given effect by notification dated 20-1-2014. Whereas, under CBLR, 2013 having found the necessity to prescribe a period, the Central Board, the statutory authority had

included the same in Regulations itself, when they were brought into force. Therefore, when time limit is prescribed in Regulations, which empowers action under Regulation 18 by following the procedure in Regulation 20(1), the use of the term "shall" cannot be termed as "directory". Under such circumstances, the rule can only be termed as "mandatory".

The ratio of the above decisions that the time limits prescribed are to be mandatorily followed has also been followed by the Tribunal in several decisions such as -

(i) 2016-TIOL-157-CESTAT-DEL = 2016 (332) E.L.T. 751 (Tri.), M/s. Atharva Global Logistics v. Commissioner of Customs, New Delhi.

(ii) 2015-TIOL-2467-CESTAT-DEL = 2016 (331) E.L.T. 614 (Tri.), M/s. Lohia Travels and Cargo v. Commissioner of Customs (General), New Delhi.

(iii) 2016-TIOL-524-CESTAT-DEL, M/s. Zen Cargo Movers Pvt. Ltd. v. Commissioner of Customs, New Delhi.

***10.** We find the Hon'ble High Court decisions cited above are directly dealing with CBLR and sanctity of time limit under the regulation. As such the order of the lower authority which was issued without adhering to the time schedule is liable to be set aside on these grounds. Accordingly, we set aside the impugned order dated 11-5-2015 of the original authority and allow the appeals.*

6.2. Further the enquiry report which as per the Regulation should be submitted within 90 days from the date of issuance of such show-cause notice has also been not adhered to in the present case. The enquiry report forwarded on 15/09/2017 but the said report is not dated. The enquiry report was served on 26/09/2017 which is also beyond 90 days prescribed under the Regulations.

7. In view of our discussion above, we are of the considered opinion that the Department has not followed the mandatory provision regarding the time limit as provided in Customs Broker Licensing Regulations, 2013. Consequently, we set aside the order of revocation of CHA licence of the appellant only on this ground without going into the merits of the case by following the ratio of Hon'ble Hon'ble High Court of Madras in the case of Santon Shipping Services Vs. CC, Tuticorin and anr. in CMP No.5921 of 2016 and CMA No.730 of 2016 / Order dt. 13/10/2017. Appellant's appeal is allowed. Stay application also disposed of.

(Order was pronounced
in Open Court on **..................**)

DEVENDER SINGH
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

Raja...